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IN THE COURT OF APPEALS OF INDIANA

JOHNEY MUNCY,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 03A01-0710-CR-478
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No. 03D01-0405-FC-750

March 12, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Johney Muncy appeals the denial of his motion to correct erroneous sentence. We remand for resentencing.

Issue

Did the trial court err in denying Muncy's motion?

Facts and Procedural History

On September 30, 2004, a jury found Muncy guilty of Count I, class C felony operating a vehicle after lifetime suspension, Count II, class A misdemeanor operating a vehicle while intoxicated ("OWI"), Count III, class C felony battery by means of a deadly weapon, and of being a habitual substance offender. On November 10, 2004, the trial court sentenced Muncy to concurrent terms of seven years on Count I and one year on Count II. The court sentenced Muncy to six years on Count III, to be served consecutive to the sentences on Counts I and II. Finally, the court imposed a five-year sentence for the habitual substance offender finding, to be served consecutive to the other sentences, for an aggregate sentence of eighteen years, all executed. The court credited Muncy with 378 days against his sentence. Muncy pursued a direct appeal in which he challenged his convictions on evidentiary grounds and his sentence on Sixth Amendment grounds. This Court affirmed Muncy's convictions and sentence. *Muncy v. State*, No. 03A01-0503-CR-127 (Ind. Ct. App. Sept. 20, 2005).

On March 30, 2007, Muncy filed a motion to correct erroneous sentence, which presumably alleged that the trial court erred in its treatment of the habitual substance

offender enhancement.[1] On August 1, 2007, the trial court issued an order denying Muncy's motion that reads in pertinent part as follows:

> 1. The sentences ordered in this case are within the range provided by statute and therefore are not erroneous.
> 2. The appeal filed by the Defendant included a claim that his sentence in this case was not appropriate. The Court of Appeals affirmed the decision of this court regarding the sentence.
> 3. The Defendant did not allege his sentence was erroneous on appeal and has waived this issue even though the sentence is not erroneous.

Appellant's Br. at 10. Muncy now appeals.

Discussion and Decision

In *Pettiford v. State*, 808 N.E.2d 134 (Ind. Ct. App. 2004), we explained that Indiana Code Section 35-38-1-15

> provides a remedy for a convicted person who is sentenced erroneously. Under the statute, the trial court may correct an erroneous sentence. A motion to correct sentence is appropriate where the sentence is erroneous on its face. A sentence is facially defective if it violates express statutory authority at the time the sentence is pronounced, as when the sentence falls outside the statutory parameters for the particular offense or is based on an erroneous interpretation of a penalty provision.

Id. at 136 (citations omitted).[2] Muncy contends, and the State concedes, that his sentence is based on an erroneous interpretation of a penalty provision and therefore is facially defective.

Pursuant to Indiana Code Section 35-50-2-10(b), "[t]he state may seek to have a person sentenced as a habitual substance offender for any substance offense by alleging …

[1] Muncy's motion does not appear in the record before us.

[2] *See* Ind. Code § 35-38-1-15 ("If the convicted person is erroneously sentenced, the mistake does not render the sentence void. The sentence shall be corrected after written notice is given to the convicted person. The convicted person and his counsel must be present when the corrected sentence is ordered. A motion to correct sentence must be in writing and supported by a memorandum of law specifically pointing out the defect in the original sentence.").

that the person has accumulated two (2) prior unrelated substance convictions." If the person is found to be a habitual substance offender, "[t]he court shall sentence [him] to an additional fixed term of at least three (3) years but not more than eight (8) years imprisonment, to be added to the terms of imprisonment imposed under IC 35-50-2 [felonies] or IC 35-50-3 [misdemeanors]." Ind. Code § 35-50-2-10(f). In *Reffett v. State*, 844 N.E.2d 1072, 1074 (Ind. Ct. App. 2006), we determined that a habitual substance offender finding neither constitutes a separate crime nor results in a separate sentence, but rather results in a sentence enhancement imposed upon a defendant's substance offense conviction, which in this case is Muncy's OWI conviction. Rather than treating the habitual substance offender enhancement as a separate sentence, the trial court should have imposed it upon Muncy's one-year sentence for his OWI conviction.

As for the trial court's determination that Muncy waived this issue by not raising it in his direct appeal, the State cites several cases for the proposition that "[a] sentence that is not authorized by statute is an illegal sentence and such constitutes fundamental error that may be corrected at any time." Appellee's Br. at 4 n.4 (citing, *inter alia*, *Kline v. State*, 875 N.E.2d 435, 438 (Ind. Ct. App. 2007)). Recently, our supreme court held that a defendant who pursued a belated appeal procedurally defaulted his challenge to the trial court's consideration of aggravating and mitigating factors, in that he had raised the same issue in a previous post-conviction proceeding and did not appeal that decision when the post-conviction court reduced his sentence on other grounds, i.e., the trial court's use of an improper presumptive sentence for felony murder. *Hughes v. State*, No. 49S04-0802-CR-86,

2008 WL 453036 (Ind. Feb. 27, 2008). In so holding, the *Hughes* court noted that "[i]ssues presented, or available but not presented, at one stage in the proceedings are forfeited and cannot be brought in a subsequent stage." *Id.* at *2 (citing *State v. Holmes*, 728 N.E.2d 164, 168 (Ind. 2000), cert. denied (2001)).

We believe that *Hughes* is not controlling here, in that Muncy is challenging the legality of his sentence, rather than the trial court's consideration of aggravating and mitigating factors or the appropriateness of his sentence under Indiana Appellate Rule 7(B).[3] *Compare Ellis v. State*, 567 N.E.2d 1142, 1145 (Ind. 1991) ("[T]o be fundamental error, the error must go to the substance of the sentence itself—i.e. an illegal sentence—not the procedures upon arriving at the sentence."),[4] *and Mitchell v. State*, 659 N.E.2d 112, 115 (Ind. 1995) ("A judge cannot impose a sentence that does not conform to the mandate of the applicable statute(s)."), *with Robinson v. State*, 805 N.E.2d 783, 786 (Ind. 2004) (recognizing

[3] *See* Ind. Appellate Rule 7(B) ("The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.").

that "for claims not waived for failure to raise them by direct appeal, a defendant may seek recourse" by filing motion to correct erroneous sentence pursuant to Ind. Code § 35-38-1-15). It is true that Muncy could have presented this issue in his direct appeal, but based on the nature of the error alleged, we decline to hold that his claim is barred by procedural default. That said, we are uncertain how far our supreme court is willing to extend the application of this doctrine.[5]

To the extent the trial court suggested that this issue is barred by res judicata because Muncy challenged his sentence on direct appeal, the State correctly observes that "the issue of an *erroneous* sentence was not presented and decided on direct appeal, [and therefore] the erroneous sentencing issue is not barred by the doctrine of *res judicata*." *Id*. (citing, *inter*

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[4] *Ellis* was a direct appeal of a defendant's sentence. Six years later, in *Canaan v. State*, our supreme court explained,

> While concerns over due process do sometimes merit invocation of a fundamental error exception to the contemporaneous objection rule *on direct appeal*, we think its availability as an exception to the waiver rule in post-conviction proceedings is generally limited to those circumstances we set forth in *Bailey v. State*, 472 N.E.2d 1260, 1263 (Ind. 1985): "[D]eprivation of the Sixth Amendment right to effective assistance of counsel, or … an issue demonstrably unavailable to the petitioner at the time of his [or her] trial and direct appeal."

683 N.E.2d 227, 235 n.6 (Ind. 1997) (alterations in *Canaan*), *cert. denied* (1998). In *Robinson v. State*, the court stated that because motions to correct erroneous sentence pursuant to Indiana Code Section 35-38-1-5 "based on clear facial error are not in the nature of post-conviction petitions, we conclude that they may also be filed after a post-conviction proceeding without seeking the prior authorization necessary for successive petitions for post-conviction relief under Indiana Post-Conviction Rule 1(12)." 805 N.E.2d 783, 788 (Ind. 2004).

[5] For example, would a defendant in similar procedural circumstances be foreclosed from challenging the erroneous imposition of a thirty-year habitual offender enhancement? *See* Ind. Code § 35-50-2-8(h) ("The court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense. However, the additional sentence may not exceed thirty (30) years.").

alia, *Harris v. State*, 861 N.E.2d 1182, 1186 (Ind. 2007)) (initial emphasis added). Consequently, we must remand for resentencing in accordance with this opinion.[6]

Remanded.

BAILEY, J., and NAJAM, J., concur.

[6] The State contends that the practical effect of the sentencing error is de minimis, thus rendering Muncy's claim moot. To support this contention, the State has included as an appendix to its brief Muncy's offender data sheet from the Department of Correction's website. We are unwilling to conclude that Muncy's claim is moot based on an unauthenticated document that was not part of the record before the trial court.